SUPREME COURT, U.S.

No. 434

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JACKSON L. BOUGHNER,

Petitioner,

vs.

PAUL W. TILLOTSON, Special Agent,
Internal Revenue Service,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on June 17, 1964.

CITATION TO OPINIONS BELOW.

The opinion of the Court of Appeals, affirming the order of the District Court was rendered on June 17, 1964, and is not yet officially reported. It is unofficially reported at 64-2 USTC 9562 and is reprinted in Appendix A hereto, p. App. 1, *infra*. The opinion of the District Court for the Northern District of Illinois, Eastern Division, dated December 16, 1963, is reported at 225 F. Supp. 45 and reprinted in Appendix B hereto, p. App. 7, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 17, 1964. A timely petition for rehearing was denied on July 20, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether Section 7602 of the Internal Revenue Code of 1964 authorizes the Secretary of the Treasury or his delegate to issue a summons for the purpose of 1) learning the identity of an anonymous taxpayer, on whose behalf an attorney has made a payment to the Internal Revenue Service, and 2) determining whether such anonymous taxpayer should be criminally prosecuted.

STATUTE INVOLVED.

This case involves Section 7602 of the Internal Revenue Code of 1954, 26 U. S. C. § 7602:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT OF THE CASE.

Jurisdiction of the District Court was invoked to enforce compliance with an Internal Revenue Service summons.

On July 27, 1961, petitioner, an attorney, sent a letter to the Chicago District Director of Internal Revenue remitting $215,499.95 on behalf of an unnamed taxpayer. (A. 12). Thereafter, in March, 1962, respondent, a Special Agent of the Intelligence Division of the Internal Revenue Service, was assigned to ascertain the name of the taxpayer, the years covered by the remittance and to determine whether or not there should be a criminal prosecution. He was not joined in this assignment by any Internal Revenue Agent of the Audit Branch of the Internal Revenue Service. (A. 14, 16, 24). Respondent subsequently interviewed the petitioner who advised that he did not know the name of the taxpayer or the years involved, and that the matter had been brought to him by another lawyer, whose name he refused to divulge on the ground that it was a privileged communication. (A. 16, 18, 20.).

On October 12, 1962, respondent served an Internal Revenue Service summons upon petitioner which commanded him to appear before respondent and give testimony relating to the tax liability of "John Doe, the unknown taxpayer or taxpayers, on whose behalf Jackson L. Boughner delivered to the Internal Revenue Service a cashier's check for $215,499.95. . . ." (A. 18, 19.). Petitioner appeared before respondent as required by the summons but the hearing was terminated upon his objection to the validity of the summons. (A. 30.).

On August 27, 1963, respondent petitioned the United States District Court to enforce the summons, and on December 16, 1963, after a hearing at which respondent testified, the Court entered an order for compliance with the summons. (A. 24). The order of the District Court was affirmed on appeal by the Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT.

1. **The decision below raises an important question regarding the extent of the summonsing power granted to the Secretary of the Treasury by the Congress of the United States.**

Congress, in Section 7602 of the Internal Revenue Code of 1954 has specifically authorized the Secretary of the Treasury to issue a summons "For the purpose of * * * determining the liability of any person for any Internal Revenue tax * * *" The decision below extends this authorization by judicial fiat to include the purpose of seeking out the identity of one whose tax liability is not otherwise the object of inquiry by the Internal Revenue Service, and the purpose of obtaining evidence for use in a criminal prosecution.

This broadening of the Secretary's power, which is uncalled for by the needs of his office and which is not implicit in the words of the statute granting the power of summons, holds promise of far reaching effect upon numerous citizens both in their capacities as taxpayers and as witnesses. No citizen, be he doctor, lawyer, banker, merchant or wage earner, will be immune from giving testimony to an Internal Revenue Agent concerning his dealings with others, not because such others are the subject of examination by the Internal Revenue Service, but merely be-

cause an agent is desirous of obtaining names of persons who may or may not owe tax, concerning whom he may or may not conduct investigations.

The effect of this decision may be said to broaden the power of the Secretary to issue general warrants without authorization by the Congress. In *Hubner* v. *Tucker*, 245 F. 2d 35, 51, (9th Cir. 1957) Judge James Alger Fee remarked:

> "It has heretofore been held that, so far as a member of the general public is concerned, not a taxpayer, the privilege against an unreasonable search and seizure should be given great effect. Echoes of the American Revolution are found in this protest against a general warrant which permits the search and seizure of all the papers of an individual. We do not believe that, simply because some taxpayer may have had a grocery account entered upon the books of the grocer, the intention of Congress was to allow the Internal Revenue Service to investigate all the records of the grocer on the theory that some of them might be relevant to the inquiry of the tax status of another person. . . ."

The further effect of this decision is to place citizens in the position of being required to answer summonses issued by special agents of the Internal Revenue Service concerning persons whose tax liability is not in question, but who may be under investigation for alleged violations either of the criminal provisions of the Internal Revenue Code or of the general criminal provisions of Title 18 of the United States Code.

That such is the effect of this decision can be seen from the fact that respondent herein was conducting his investigation, pursuant to which the summons was issued, alone and without the joint attendance of an internal

Revenue Agent of the Audit Division. The respondent has been specifically excluded by regulations governing his duties from "determining tax liability" and has been charged with making recommendations as to criminal prosecution.[1] The force of this decision is that special agents of the Internal Revenue Service would be granted a power in the investigation of crime which Congress has not seen fit to grant them under the statute, and which Congress has likewise not seen fit to grant the special

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[1] Statement of Organization and Functions, Treasury Department Publication No. 383 (CCH 1964 Stand. Fed. Tax Rep. § 5988).

"1118.6 *Intelligence Division.* (1) The intelligence Division investigates alleged criminal violations of the tax statutes, including racketeer and wagering tax cases, but excluding alcohol, tobacco and certain firearms tax cases.

"(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recommendations as to the disposition of cases investigated, including recommendations of criminal prosecution, and the assertion of civil penalties. It provides assistance to U. S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents."

* * *

"1118.41 *Field Audit Branch.* (1) The Field Branch conducts field examinations relative to all types of taxes (except alcohol, tobacco, and firearms) to determine correct liabilities of taxpayers for tax and penalties, including the examination of claims for refund, credit or abatement, or for redemption of stamps. It also conducts field examinations of offers in compromise based on either doubt as to liability or inability to pay, and special field examinations as requested including joint examinations with special agents of the Intelligence Division where tax evasion may exist. The Branch processes informants' claims for reward making any necessary investigations and prepares reports on such claims, together with recommendations as to the amount of rewards."

agents of the Federal Bureau of Investigation, who constitute the body primarily charged with investigation of federal criminal laws. See the powers of the agents of the Federal Bureau of Investigation set forth in Title 18 United States Code, Section 3052.

2. The decision below conflicts with relevant decisions of other courts of appeal and district courts with respect to the use of a summons to discover unknown taxpayers who are not currently under investigation and with respect to the use of a summons to discover evidence for purposes of criminal prosecutions.

The decision below holds that Section 7602 of the Internal Revenue Code of 1954 authorizes the Secretary of the Treasury to issue a summons to learn the identity of an unknown taxpayer. This holding is contrary to the decision of the First Circuit Court of Appeals in *McDonough* v. *Lambert*, 94 F. 2d 838 (1st Cir. 1938) the Fifth Circuit Court of Appeals in *First National Bank of Mobile* v. *United States*, 160 F. 2d 532, 535 (5th Cir. 1947), and the District Court of Pennsylvania in *Mays* v. *Davis*, 7 F. Supp. 596 (D.C. Penna. 1934). The court in the *McDonough* case refused to enforce a summons which was issued to the McDonough Company for the purpose of learning the identity of a person to whom the McDonough Company had paid $10,000 in currency. The court in the *First National Bank of Mobile* v. *United States*, refused to require the production of records which disclosed dealings of a bank with persons who were not party to the returns under investigation. In *Mays* v. *Davis* the District Court of Pennsylvania refused to enforce the summons requiring a trust company to disclose the names of the beneficiaries of trusts.

In all of these cases the power of the summons was invoked to learn the identity of persons who were not currently under investigation and in all of these cases that power was limited by the court.

The decision below permits the use of a summons to discover evidence of criminal violations irrespective of whether the determination of tax liability is a concomitant end of the investigating agent. The Court of Appeals relies upon *Boren* v. *Tucker*, 238 F. 2d 767 (9th Cir. 1956) and *In re Magnus Babee & Reynard, Inc.*, 311 F.2d 12 (2d Cir. 1962) to support its holding that the summons may properly issue in a situation such as in the case at bar. However, in each of these cases a good faith examination was being conducted by an Internal Revenue *Audit* Agent to determine correct liability, notwithstanding the fact that a special agent of the Intelligence Division was also jointly assigned to the investigation. The case at bar differs from the cited cases in that here, no agent of the Audit Branch of the Internal Revenue Service was assigned to the investigation. Since only an audit agent is authorized to determine tax liability[2] such a determination *could not* have been one of the purposes for which the summons in the instant case was issued by the special agent. The only relevant purpose authorized by the statute for the issuance of a summons is determining liability for tax. The decision below permitting the issuance of the summons for determining criminal penalties, a purpose not within the statute, is in conflict with *First National Bank of Mobile* v. *United States*, 160 F.2d 532, 534 (5th Cir. 1947) *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731, 735 (9th Cir. 1942), *Hubner* v. *Tucker*, 245 F. 2d 35, 39 (9th Cir.

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[2] See Regulations setting forth duties of special agents and Internal Revenue Agents of the Audit Division, footnote (1) *supra*.

1957) and *Pacific Mills* v. *Kenefick*, 99 F. 2d 188, 189 (1st Cir. 1938) all of which cases hold that the Internal Revenue Service summons may issue only for the purposes spelled out in the statute granting the authorization for the use of a summons. The decision below is furthermore in conflict with *United States* v. *O'Connor*, 118 F. Supp. 248, 251 (D.C. Mass. 1953) and *Application of Myers*, 202 F. Supp. 213 (D. C. Penna. 1962), which specifically hold that an Internal Revenue summons may not issue in aid of a criminal prosecution.

3. The decision below is in error.

The statute authorizing the Secretary of the Treasury to issue summonses plainly states the only purpose for which he may do so. These purposes are narrowly confined to ascertaining the correctness of a return or making one where none has been filed, and, in general, determining tax liability. If a summons issues without the statutory purpose existing it is invalid and beyond the scope of the Secretary's Power. *First National Bank of Mobile* v. *United States*, 160 F. 2d 532, 535 (5th Cir. 1947), *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 at p. 735, (9th Cir. 1942), *Hubner* v. *Tucker*, 245 F. 2d 35, 41 (9th Cir. 1957), and *Pacific Mills* v. *Kenefick*, 99 F. 2d 188 (1st Cir. 1938).

The stated purposes of respondent in issuing the summons were to learn the name of the taxpayer, the years covered by the payment, the correct tax liability and to determine whether there should be criminal prosecution. (A. 16, 19, 28, 24). The only valid purpose for which the summons could have been issued was to determine the correct tax liability of the unknown taxpayer. However, respondent was precluded by the regulations governing his office from making such determination. His real purpose

was to determine whether there should be criminal prosecution, and this was the only determination he was authorized to make, by virtue of his position. But this is a purpose for which the statute does not authorize the issuance of a summons.

Since the statute does not authorize the issuance of a summons either to learn the identity of an unknown taxpayer or to discover evidence of criminal violations, and since respondent was not authorized to determine tax liability, the decision below affirming the District Court's order of compliance with the summons is in error.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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August 24, 1964

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 14450 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

PAUL W. TILLOTSON, Special Agent, Internal Revenue Service,
Plaintiff-Appellee,

v.

JACKSON L. BOUGHNER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 17, 1964

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This appeal is from an order of the district court in a proceeding under the provisions of section 7604 of the Internal Revenue Code of 1954. The order directed defendant Jackson L. Boughner, an attorney, to appear and give testimony before Paul W. Tillotson, a special agent of the Internal Revenue Service, pursuant to an Internal Revenue summons issued under section 7602 of the Code.

In July, 1961, defendant sent a letter to the Chicago district director of Internal Revenue enclosing $215,499.95 in behalf of an unknown taxpayer. In March, 1962, agent

Tillotson was assigned to discover the name of the taxpayer and the years covered by the check, and also to determine whether there should be a criminal prosecution. Defendant informed the agent that he did not know the name of the taxpayer or the years involved; that the matter had been referred to him by another lawyer whose name he refused to divulge.

In October, 1962, defendant was served with an Internal Revenue summons commanding him to appear before the agent. Defendant appeared as the summons required but objected to its validity. He did not testify. The agent petitioned the district court to enforce the summons and thereafter, following a hearing, the court entered the order from which this appeal is taken.[1]

I.

Section 7601(a) of the Code authorizes the Internal Revenue Service to investigate the tax liability of taxpayers.[2] To implement such investigation, section 7602

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[1] This court held in *Tillotson* v. *Boughner*, 327 F. 2d 982 (7th Cir. 1964), that the order was final and appealable following the decision in *Reisman* v. *Caplin*, 375 U. S. 440 (1964).

[2] § 7601(a) reads:

> General rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

of the Code[3] gives the Service broad powers of discovery. *De Masters* v. *Arend*, 313 F. 2d 79 (9th Cir. 1963).

According to the evidence submitted to the district court agent Tillotson was assigned to discover the anonymous taxpayer's identity in order to determine his correct tax liabilities and whether there had been a criminal violation. We hold sections 7601(a) and 7602 authorized the investigation undertaken and the issuance of the summons.

Defendant argues that only an investigation of a taxpayer whose identity is known is authorized. We reject this argument. Defendant has been summoned to testify concerning a taxpayer who paid a large sum of money, purportedly covering his tax liability. That his name and whereabouts are not known does not discount the fact that *a* taxpayer exists whose tax liability the Internal Revenue Service has statutory authority to investigate.

Defendant cites *McDonough* v. *Lambert*, 94 F. 2d 838 (1st Cir. 1938), *In re International Corp. Co.*, 5 F. Supp. 608 (S.D. N.Y. 1934), and *Mays* v. *Davis*, 7 F. Supp. 596 (W.D. Pa. 1934), in support of his position. These cases are distinguishable. In *McDonough* the Service wanted to know to whom the McDonough Company had paid a $10,000 legal fee. Only the company was under investigation. The court of appeals vacated the district court's enforcement

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[3] The pertinent language of section 7602 reads:

> For the purpose of . . . determining the liability of any person for any internal revenue tax . . . the Secretary or his delegate is authorized— . . . To summon the person liable for the tax . . . or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and . . . to give such testimony, under oath, as may be relevant or material to such inquiry.

of the summons on the theory that it related to the tax return of the lawyer who had received the fee and that it had no relevancy to the company's tax liability. To the same effect is *In re International Corp. Co,* In *Mays,* the Service was engaged in a fishing exploration, attempting to examine the books of a trust company that such examination might furnish information of tax liability of some of the trusts administered by the company or their beneficiaries.

Here, the tax liability of the person who sent a check for a substantial sum to the Service, purportedly to pay his taxes, is under investigation. Defendant has been summoned to testify concerning that specific taxpayer's liability.

II.

The functions of the Intelligence Division of the Internal Revenue Service are delineated in the applicable Treasury regulations.[4] Special agents of the division are not only

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[4] Statement of Organization and Functions, Treasury Department Publication No. 383 (CCH 1964 Stand. Fed. Tax Rep. ¶ 5988).

1118.6 *Intelligence Division.*

(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recommendations as to the disposition of cases investigated, including recommendations of criminal prosecution, and the assertion of civil penalties. It provides assistance to U. S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents.

Treas. Reg. § 301.7602-1.

(a) *In general.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax (including any interest, additional amount, addition to the

authorized to investigate possible criminal violations but also to ascertain civil penalties. The regulations covering the issuance of summons under section 7602 are not confined to any one branch of the Service.

Agent Tillotson testified that he was assigned not only to learn the taxpayer's identity, but whether the correct tax had been paid and whether there are any fraud penalties, criminal or civil. These duties were authorized by regulation.

No criminal prosecution existed at the time the summons was issued. For that reason the cases relied upon by defendant, *United States* v. *O'Connor*, 118 F. Supp. 248 (D.C. Mass. 1953), and *Application of Myers*, 202 F. Supp. 212 (E.D. Pa. 1962), are distinguishable.

The propriety of a special agent's issuance of a summons in a situation such as presented here was approved in *Boren* v. *Tucker*, 239 F. 2d 767 (9th Cir. 1956). *Cf. In re Magnus, Babee & Reynard, Inc.*, 311 F. 2d 12 (2d Cir. 1962).

The order of the district court is affirmed.

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tax, or civil penalty) or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, any authorized officer or employee of the Internal Revenue Service may examine any books, papers, records or other data which may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

No. 14450

KNOCH, *Circuit Judge.* (Concurring.) I note that we do not have before us any issue concerning a claim of constitutional or other privilege.

We are proceeding on the basis that no criminal prosecution existed at the time the summons was issued. The applicable Treasury regulations do authorize Special Agents of the Intelligence Division of the Internal Revenue Service to ascertain civil penalties as well as to investigate possible criminal violations.

Nevertheless, departure here from the usual procedure of tandem investigation by a Special Agent and an Internal Revenue Agent who is a member of the Field Audit Branch reasonably gives rise to a state of dubiety concerning the actual purpose for issuing the summons.

However, in the peculiar circumstances of this specific case, I concur with my brothers' opinion that the order of the District Court be affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL W. TILLOTSON, Special Agent, Internal Revenue Service, *Petitioner*,
v.
JACKSON L. BOUGHNER, *Respondent*.
63 C 1522

OPINION

In October, 1962, petitioner Paul W. Tillotson, a Special Agent of the Internal Revenue Service, issued a summons which purported to be authorized by §7602 of the Internal Revenue Code of 1954, 26 U.S.C. This summons directed respondent Jackson L. Boughner to testify with respect to the tax liability of the taxpayer whose identity has been withheld from petitioner and on whose behalf respondent delivered a cashier's check to the District Director of Internal Revenue in Chicago. The check, dated July 27, 1961, and payable to Internal Revenue Service in the amount of $215,499.95, was drawn on the La Salle National Bank, Chicago. Accompanying the check was a letter signed by respondent which read as follows:

> "There is enclosed a cashier's check of La Salle National Bank dated July 27, 1961, payable to Internal Revenue Service in the amount of $215,499.95.
>
> "This represents additional amounts due from a taxpayer for some past years. The name of the taxpayer has not been disclosed to me. However, I am informed

that the aggregate additional amount, together with interest computed to August 1, 1961, is the amount of the check, $215,499.95.

"No investigation of any kind is now in process by the Internal Revenue Service. There seems to be no reason to believe that one will be promulgated in the future. However, the attorney representing this taxpayer concluded that there were additional taxes due the United States and recommended to his clients that payment be made. The amount transmitted may be deposited in the Deposit Fund Account of the Treasurer of the United States or in such other account as may be appropriate for unidentified collections."

The summons was returnable at a time and place certain. By agreement, respondent's appearance pursuant thereto was continued to a later date at which time he was present but, through his counsel, refused to answer all questions put to him on the ground that the summons was invalid. The hearing was adjourned and was resumed several months later when respondent again appeared and again refused to answer questions pertaining to the subject matter of the summons. This second hearing was terminated and the instant petition filed some months thereafter. The Court has jurisdiction to hear and decide the merits here involved. 26 U.S.C. §7604.

In his answer to the petition, respondent denied that the summons was issued pursuant to authority granted to the Commissioner by §7602. He further denied that the summons was served upon him lawfully in accordance with §7603 of the Code. At the hearing held in September of this year, however, respondent withdrew his objection to the manner in which the summons was served but reiterated his contention that the summons was issued without statutory authority. In particular, he claims that §7602 does

not authorize the issuance of a summons to obtain information with respect to a taxpayer whose identity is unknown either to the Commissioner or to the party served. He also argues that even if §7602 authorizes the issuance of such a summons, a Special Agent is not authorized to issue it. These are the only issues presented to the Court.

That portion of §7602 which is here relevant provides the following:

> "*For the purpose of* ascertaining the correctness of any return, making a return where none has been made, *determining the liability of any person for any internal revenue tax* or * * * the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--
>
> * * *
>
> (2) *To summon* the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or *any other person the Secretary or his delegate may deem proper*, to appear before the Secretary or his delegate at a time and place named in the summons * * * and to give such testimony, under oath, as may be relevant or material to such inquiry; * * *." Emphasis supplied.

Respondent's first contention, that §7602 does not authorize the issuance of a summons to inquire into the tax liability of a taxpayer whose identity has been concealed, is clearly erroneous. The statute explicitly authorizes an inquiry into the tax liability of *any person* for *any internal revenue tax*. Nowhere is it provided that the identity of such a taxpayer must be known to the Commissioner before he is authorized to issue a summons.

Respondent cites several cases, including *McDonough* v. *Lambert*; 94 F. 2d 838 (1st Cir. 1938); *Mays* v. *Davis*, 7 F. Supp. 596 (W.D.Pa. 1934); and *In re International Corp. Co.*, 5 F.Supp. 608 (S.D.N.Y. 1934), in support of his first contention. All of these cases, however, involve predecessor sections to the current §7602 none of which contained the broad language, now found in that section, that a summons may be issued for the purpose of determining the tax liability of *any* person.[1] Moreover, these cases are factually distinguishable because in none did the Commissioner have reason to believe that unpaid taxes were owed by a taxpayer whose name he did not know, and in none did a taxpayer admit his tax liability while concealing his identity. The Commissioner is not here engaging in a fishing expedition.[2]

Respondent also cites additional cases,[3] but they are inapposite and do not warrant discussion.

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[1] Respondent points out that the House and Senate reports accompanying the Internal Revenue Act of 1954 state that § 7602 contains no material change from prior law—H.R. Rep. No. 1337, 83rd Cong., 2d Sess. (1954); S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954). The legislative history of a statute cannot alter its scope where it is an unambiguous statute. *Cf. United States* v. *Zions' Sav. & Loan. Ass'n.*, 313 F.2d 331, 336 (10th Cir. 1963).

[2] The *McDonough* case is further distinguishable in that there the Commissioner had available to him an alternative means of obtaining the information whereas here he has no such statutory alternative by which to obtain the information to which he is entitled.

[3] *Pacific Mills* v. *Kenefick*, 99 F.2d 188 (1st Cir. 1938) (Commissioner not permitted to use summons section in seeking to discover offsets to be used solely in defense against taxpayer's civil suit for refund of overpayment); *Application of Carroll*, 149 F. Supp. 634 (S.D.N.Y.), *aff'd. sub nom. Application of United States* (Carroll), 246 F.2d 762 (2d Cir.), *cert. denied*, 355 U.S. 857 (1957) (upholding use of summons in inquiry to determine residence of named taxpayer).

There remains only respondent's contention that a Special Agent must concern himself solely with criminal matters and that he lacks authority to issue a §7602 summons to assist in ascertaining the identity of an unidentified taxpayer and determining his tax liability. The Court has found no authority to support respondent's position. The Regulations contain no such restriction, Treas. Reg. §301.7602-1 (1959), and none is to be found in the Treasury Department's publication which describes internal administration of the Service, "Statement of Organizations and Functions", Treas. Dept. Publica. No. 383, 6 CCH 1963 Stand. Fed. Tax Rep. ¶5988 (See ¶5988-1118.6(2)).

The summons here was issued for a lawful purpose by an official with authority to issue it. Accordingly, respondent is ordered to comply with it.

Hubert H. Will
Judge

Dated: December 16, 1963

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 434

JACKSON L. BOUGHNER, PETITIONER

v.

PAUL W. TILLOTSON, Special Agent,
Internal Revenue Service

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the district court (Pet. App. 7-11) is reported at 225 F. Supp. 45. The opinion of the court of appeals (Pet. App. 1-5) is reported at 333 F. 2d 515.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1964. A petition for rehearing was de-

nied on July 20, 1964. The petition for certiorari was filed on August 26, 1964. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, in support of its investigation into the tax liabilities of an unknown taxpayer, the Internal Revenue Service could issue a summons to the person who has transmitted to the Service a check of over $215,000 on behalf of the taxpayer.

2. Whether a special agent is authorized to issue an Internal Revenue summons in support of his investigation into a taxpayer's correct tax liabilities, when such investigation might conclude with a recommendation for criminal prosecution.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.
>
> (a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.
>
> * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be revelant or material to such inquiry.

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

Sec. 301.7602-1 *Examination of books and witnesses.*

(a) *In general.* For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax (including any interest, additional amount, addition to the tax, or civil penalty) or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, any authorized officer or employee of the Internal Revenue Service may examine any books, papers, records or other data which may be relevant or material to such inquiry; and take such testimony of the person concerned, under oath, as may be relevant to such inquiry.

* * * *

(c) *Persons who may issue summons.* The following officers and employees of the Internal Revenue Service are authorized to issue a summons pursuant to sections 6420(e)(2), 6421(f)(2), and 7602—

* * * *

(4) Intelligence: Director; assistant director; assistant regional commissioners; executive assistants to assistant regional commissioner; chiefs, Review and Conference Staff; reviewer-conferees; chiefs and assistant chiefs of divisions, branches and sections; group supervisors; and special agents of the national, regional and district offices.

* * * *

STATEMENT

On October 12, 1962, Special Agent Paul W. Tillotson served an Internal Revenue summons on petitioner (R. 6-7).[1] The summons was captioned "In the matter of the tax liability of John Doe, the unknown taxpayer, or taxpayers, on whose behalf Jackson L. Boughner delivered to the Internal Revenue Service a cashier's check for $215,499.95, dated July 27, 1961 and drawn on the LaSalle National Bank, Chicago, Illinois" (R. 6). It called for Boughner to appear before Special Agent Tillotson on October 23, 1962, and give testimony regarding the tax liability of the above-described taxpayer (R. 6). This date was extended by agreement to October 25, 1962, at which time Boughner appeared, with his attorney, and refused to comply with the summons (R. 4, 10). The hearing was continued to January 15, 1963, at which time petitioner gave his name and address, but refused to comply further with the summons (R. 4-5, 11). These refusals were predicated upon the objection that the summons was illegal and invalid (R. 30).

This action was commenced on August 27, 1963, when a petition (R. 2-5) to enforce the summons was filed in the United States District Court for the Northern District of Illinois (R. 1). The petition alleged, in pertinent part, that the District Director received a letter (R. 12-13) signed by petitioner, dated July 27, 1961, containing a cashier's check for

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[1] "R." references are to the appendix to petitioner's brief filed in the court of appeals.

$215,499.95, payable to the Internal Revenue Service (R. 3), and stating that the check was to cover additional amounts due from an unnamed taxpayer for some past years (R. 3, 12). The petition recited that, after receipt of this letter, Agent Tillotson was assigned to investigate the nature of the indebtedness disclosed by the letter, and he issued the instant summons in furtherance of that investigation (R. 4). The petition alleged petitioner's failure to comply with the summons, and closed with a prayer that the court enforce the summons by ordering petitioner to comply upon pain of contempt (R. 4-5).

Petitioner filed his answer (R. 9-12) on September 23, 1963 (R. 1). He alleged that the summons was invalid, in that it was not issued for any of the purposes authorized by Section 7602 of the Internal Revenue Code of 1954, and prayed that the petition be dismissed.

The case was heard on September 27, 1963 (R. 1, 13-24). Agent Tillotson testified that in March, 1962, he was assigned to investigate the taxpayer, upon whose behalf petitioner had sent the letter and check to the Service, to ascertain his name, the years involved, and any other information pertinent to the filing of tax returns (R. 15-16); that he interviewed petitioner on March 8, 1962, at which time petitioner stated that he did not know who the taxpayer was, the years involved, or even if the taxpayer was an individual or a corporation (R. 16); that petitioner would not reveal the name of the person who gave him the check to send to the Service (R. 18); and that

the agent then served the summons to determine whether or not a tax return had been filed by taxpayer, what years were involved, the liability as shown in the return, and whether that liability was correctly computed (R. 18-19).

On cross-examination, he testified that, while part of his duties as a special agent is to investigate alleged criminal violations of the Code, it is also part of his function to determine tax liabilities, i.e., whether tax has been paid on all income, and identify income and sources of income (R. 20-21); that he was primarily interested in learning taxpayer's name, ascertaining whether the correct amount of tax has been paid, and determining whether there might be any criminal liabilities (R. 23); and that evidence of a criminal violation might be uncovered as a result of this investigation, in which event it would be Agent Tillotson's function to recommend concerning possible criminal prosecution (R. 23, 24).

The district court ordered (R. 24-25) compliance with the summons, holding (Pet. App. 9-11; R. 27-29, 31) that the issuance of the summons was authorized and that Special Agent Tillotson was authorized to issue it. The court of appeals affirmed (Pet. App. 1-5). It held that the summons was properly issued in furtherance of an investigation into the tax liability of a designated, if unknown, taxpayer (Pet. App. 3), and that a special agent is authorized to issue a summons "to learn * * * whether the correct tax had been paid and whether there are any fraud penalties, criminal or civil" (Pet. App. 5).

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 5-6, 8-9, 10) that the instant summons was not authorized because the name of the taxpayer is unknown. The court of appeals, in rejecting this very argument, held (Pet. App. 3):

> Defendant has been summoned to testify concerning a taxpayer who paid a large sum of money, purportedly covering his tax liability. That his name and whereabouts are not known does not discount the fact that *a* taxpayer exists whose tax liability the Internal Revenue Service has statutory authority to investigate.

Section 7601(a) of the 1954 Code, *supra*, p. 2, charges the Secretary or his delegate to send agents "to proceed, from time to time, through each internal revenue district and *inquire* after and concerning all persons therein who *may be liable* to pay any internal revenue tax" (emphasis supplied). As the court of appeals held (Pet. App. 2-3), Section 7602 of the Code, *supra*, p. 3, gives the Service broad discovery powers to further these investigations. *DeMasters* v. *Arend*, 313 F. 2d 79, 86-87 (C.A. 9th), petition for certiorari dismissed, 375 U.S. 936.

The cases upon which petitioner relies (Pet. 8) are clearly not in point, for, as petitioner himself admits (Pet. 9):

> In all of these cases the power of the summons was invoked to learn the identity of persons *who were not currently under investigation* and in all of these cases that power was limited by the court. [Emphasis supplied.]

The trial court correctly found (Pet. App. 10) that the Commissioner is not engaged in a mere fishing expedition in the case at bar.[2] As the court of appeals pointed out (Pet. App. 4):

> Here, the tax liability of the person who sent a check for a substantial sum to the Service, purportedly to pay his taxes, is under investigation. Defendant has been summoned to testify concerning *that specific taxpayer's liability.* [Emphasis supplied.]

2. Equally without merit is petitioner's contention (Pet. 6-8, 9-11) that a special agent cannot issue an Internal Revenue summons in support of a criminal investigation.

A special agent is specifically empowered to issue a summons as the Secretary's delegate. Section 7602, Internal Revenue Code of 1954; Treasury Regulations on Procedure and Administration (1954 Code), Section 301.7602-1(c)(4), *supra*, p. 4. According to Agent Tillotson's undisputed testimony, he was assigned to investigate to learn taxpayer's name, the years covered by the check, whether the correct tax has been paid, and whether there might be any fraud penalties, criminal or civil, involved. The subject summons was served to further his investigation. To be sure, if evidence of a criminal violation were un-

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[2] Even if he were, this Court has repeatedly held that it is permissible to use the administrative, as opposed to the judicial, subpoena power to engage in general investigations. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 641-643; *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 216; *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322.

covered, it would then be his duty to recommend possible criminal prosecution. But it does not follow that the investigation is criminal, as petitioner contends (Pet. 5). It is, rather, an investigation, being conducted by a special agent, into possible civil or criminal tax liability. Petitioner's contention to the contrary is premised on the incorrect assertion, specifically rejected by both courts below (Pet. App. 4-5, 11), that a special agent's sole function is to investigate criminal liability. The flaw in the premise is reflected in the description of the functions of the Intelligence Division in the Statement of Organization and Functions, Treasury Department Publication No. 383, Section 1118.6(2) (1964 C.C.H., par. 5988),[3] which includes the assertion of civil penalties, and in the Treasury Regulations on Procedure and Administration (1954 Code), Section 301.7602-1(a), *supra*, p. 4, which authorize the issuance of a summons for use in determining civil penalties and list "special agents" among those who may issue it.

The decision reached in this case was correct and in accord with all other pertinent decisions. *Boren* v.

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[3] Statement of Organization and Functions, Treasury Department Publication No. 383 (1964 C.C.H., par. 5988):

1118.6 *Intelligence Division.* * * *

(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recomendations as to the disposition of cases investigated, including recommendations of criminal prosecution, and the assertion of civil penalties. It provides assistance to U. S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents.

Tucker, 239 F. 2d 767, 772-773 (C.A. 9th); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2d), certiorari denied, 373 U.S. 902; *Siegel* v. *Tyson*, 331 F. 2d 604 (C.A. 5th).[4] Both district court cases upon which petitioner relies (Pet. 10) are distinguishable; the summonses there involved were issued after the taxpayer had been indicted.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1964.

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[4] Although the *per curiam* opinion in the *Siegel* case does not set forth the facts, it involved the same challenge to an Internal Revenue summons issued by a special agent as the instant one. The Fifth Circuit found this contention to be so plainly lacking in merit that it affirmed from the bench.

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